United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

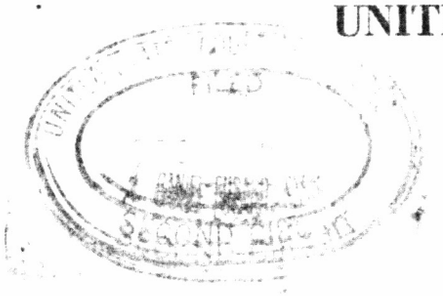
76-7360

To be submitted by
STANLEY THALER,
Of Counsel

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT



THERMAL UNIT CORPORATION,

Plaintiff-Appellant

-against-

YORK-SHIPLEY, INC.,

Defendant-Respondent.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-RESPONDENT

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PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court for the Eastern District of New York after trial without a jury (Neaher, J.) which dismissed the first cause of action in the complaint and granted plaintiff judgment against the defendant on the second cause of action in the sum of $4,195.00.

Plaintiff, in its brief, appeals from that judgment as follows:

The judgment should be reversed on the first cause of action

and damages awarded as prayed for in the complaint, together with damages for good will; the judgment should be reversed on the second cause of action to the extent that good will be awarded as an item of damage in this cause of action.

THE FACTS

Plaintiff is a seller and installer of boilers. Plaintiff solicits customers and places orders for its boilers with various manufacturers, one of whom is the defendant.

The complaint in this action sets forth two causes of action, each of which pertains to completely different transactions. They will be discussed separately herein.

The first cause of action relates to an order which plaintiff received from Tuck Industries, Inc. and will be referred to as the "Tuck" contract.

On July 10, 1974, plaintiff received from Tuck a purchase order for the purchase and installation of a York-Shipley Boiler.

On July 16, 1974, a quotation order was issued by defendant to plaintiff for the boiler under the Tuck contract. (Plaintiff's Exhibit 2A.) This order was subject to the terms and conditions of sale printed on the reverse side thereof. Items numbered 1 and 2 incorporated and made part of this quotation provided as follows:

"1. York-Shipley, Inc. shall not be liable for any failure to deliver or for any delay in effecting delivery, if such failure

or delay is caused by strikes, differences with workmen, failure of vendors to deliver materials, delays in transportation, riots, acts of God or the public enemy, fires, accidents, federal, state or local government laws or regulations, or other causes beyond York-Shipley, Inc.'s control.

"2. Promises of delivery are based on York-Shipley, Inc.'s expectation of ability to fulfill, but York-Shipley, Inc. shall not be liable for damages because of delays in fabrication or delivery."

Plaintiff accepted the quotation submitted by the defendant and added thereto the following clause: "Subject to cancellation without penalty if delivery is not as outlined."

The approximate date of shipment stated in the quotation was November 10, 1974 or before.

On August 9, 1974, defendant gave written notification to plaintiff that the anticipated shipping date was the week of November 25, 1974, and that the shipment of the order would be made upon receipt of plaintiff's certified check in advance. (Plaintiff's Exhibit 4.) No check was sent by plaintiff.

On September 30, 1974, defendant sent to plaintiff another memo stating that shipment would be delayed to December 16, 1974, as a result of problems encountered in procuring material and delay in production scheduling. (Plaintiff's Exhibit 7.) This was due to a condition of emergency which had developed in the steel industry. The particular boiler which plaintiff had requested required a special kind of heavy steel plate for which there was a limited supply available and which only Bethlehem Steel Company manufactured.

Because of a contemporaneous or prior steel strike and national defense requirements, steel companies had shut down their furnaces, had cut back in their production of steel inventory and had restricted their customers in their allotments.

On October 9, 1974, defendant again made plaintiff aware of its difficulty in procuring materials for the boiler and rescheduled shipping to the week of January 6, 1975.

On November 5, 1974, defendant wrote to plaintiff advising it that the steel for the boiler in question had arrived and that plaintiff was to make a decision as to what future action it wished defendant to take in connection with the production of this boiler. (Plaintiff's Exhibit 8.)

Plaintiff did not elect to cancel its contract as it had the right to do by reason of a delay in delivery beyond November 10, 1974, as provided for in its original quotation order.

Defendant thereafter began to produce the boiler for plaintiff and on November 11, 1974, attempted to obtain from plaintiff payment for same in advance of shipment in accordance with the terms of the agreement. (Plaintiff's Exhibit 9.)

Plaintiff refused to forward a check to defendant for the boiler in advance of the proposed date of shipment as provided for in the quotation.

On February 25, 1975, plaintiff cancelled its order for the boiler.

Plaintiff sought to recover of defendant the sum of $50,000 claiming that this was the lost profits, loss of business customers and loss of good will suffered by it as a result of the defendant's failure to ship the boiler in question.

The second cause of action relates to an order for a boiler placed with plaintiff by Imperial Finishing Company and which boiler was to be produced by the defendant. This contract will be referred to as the "Imperial" contract.

Plaintiff placed an order for the Imperial contract with defendant and which for various reasons defendant did not manufacture this boiler within the time set forth in the contract.

Imperial filed a Chapter 11 proceeding in Bankruptcy. The bankruptcy of Imperial was not due in any way to the failure of defendant to furnish plaintiff with the boiler.

The trial court awarded plaintiff damages in the sum of $4,195.00 on this cause of action. Plaintiff appeals from so much of the judgment which did not include good will on this cause of action as an item of damages.

QUESTIONS PRESENTED

(1) Did the trial court err in finding that conditions existed which excused defendant from performance of the Tuck contract?

(2) Did the trial court err in permitting defendant at the trial

to offer proof as to impossibility of performance by defendant of the Tuck contract?

(3) Did plaintiff have an obligation under the Tuck contract to pay for its order in advance of shipment?

(4) Did defendant owe plaintiff a duty to allocate materials under the Uniform Commercial Code?

(5) Did the trial court err in failing to award damages to plaintiff for good will under the Imperial contract?

POINT I

THE TRIAL COURT DID NOT ERR IN FINDING THAT CONDITIONS EXISTED THAT EXCUSED DEFENDANT FROM PERFORMANCE OF THE TUCK CONTRACT.

The Tuck contract clearly contemplated that the defendant would not be liable for delivery in the event of delay caused by strikes or failure of vendors of the defendant to deliver materials.

Plaintiff recognized this possibility and inserted in the contract the provision that it was "subject to cancellation without penalty if delivery is not as outlined."

Defendant was not a manufacturer of steel, nor did it have any method of obtaining the special kind of steel needed for this boiler other than through one supplier - Bethlehem Steel.

The record is clear that there was an unusual and unique condition of emergency in the steel industry. The heavy steel plates which

were required for the production of the Tuck boiler were in limited supply and defendant could not obtain them in order to fabricate the boiler for defendant.

Defendant's inventory records and production schedules clearly indicated that there was no steel on hand to manufacture the Tuck boiler so as to comply with the delivery date promised to plaintiff.

Defendant placed its purchase order to Bethlehem for the steel shortly after entering into the contract with plaintiff for the Tuck boiler.

The trial court, who heard all the evidence and had an opportunity to observe the witnesses, found that defendant was excused from performing its contract by reason of the shortage of steel - an event which was beyond the control of the defendant.

It cannot be said as a matter of law that this determination was manifestly erroneous or contrary to the weight of the evidence presented in the court below.

Defendant may not be held responsible for the delay in shipment of plaintiff's order because of defendant's inability to obtain the steel necessary therefor, which was a cause beyond its control and which was a condition of defendant's acceptance of plaintiff's order. NORMANDIE SHIRT CO. v. JH & CK EAGLE, INC., 238 N.Y. 218; ARKELL & DOUGLAS v. N. H. BORENSTEIN & SONS, 188 App. Div. 158, 176 N.Y.S. 581; 51 N.Y. Jur., Sales §128.

Plaintiff had the right to cancel the Tuck agreement when it did not receive delivery of the boiler on November 10, 1974. It chose

not to do so. And it is apparent that plaintiff's election to stay with defendant was because of plaintiff's awareness of the defendant's problems by reason of the steel shortage.

POINT II

THE TRIAL COURT DID NOT ERR IN PERMITTING DEFENDANT AT THE TRIAL TO OFFER PROOF AS TO THE IMPOSSIBILITY OF PERFORMANCE BY DEFENDANT OF THE TUCK CONTRACT.

Rule 15(A) of the Federal Rules of Civil Procedure provides that a party may amend his pleadings and to conform pleadings to proof and "leave shall be freely given when justice so requires" and (B) "The court may allow pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby." Leave is liberally given for a party to amend pleadings to conform to the evidence. The rule is based on fairness and to permit parties to litigate all issues between them.

The key to determine the scope of the application of the rule is whether or not permitting the amendment of the pleading at the trial will result in prejudice to the opposing party by reason of the element of surprise.

A review of the record in the Court below destroys any argument plaintiff may have that it was surprised by the defense of impossibility of performance raised by defendant.

Plaintiff's Exhibits 5, 7, 8 and 9 all contain clear references to the difficulty of defendant in obtaining materials, namely steel, for the production of the Tuck boiler.

Plaintiff recognized this difficulty with the expectation that the necessary steel would be obtained by not cancelling its agreement with defendant when delivery was not made on November 10, 1974, as provided for in the order placed with defendant.

It cannot be said under these circumstances that the defense of impossibility of performance came as a surprise to plaintiff.

The sole reason why defendant could not deliver the boiler for the Tuck contract on time was because of the shortage of materials to fabricate same.

Under these circumstances, it cannot be said that the trial court erred in permitting defendant to amend its pleading to maintain the defense of impossibility of performance and that the introduction of such evidence was prejudicial to plaintiff.

POINT III

PLAINTIFF HAD AN OBLIGATION UNDER THE TUCK CONTRACT TO PAY FOR ITS ORDER IN ADVANCE OF SHIPMENT.

Plaintiff contends that it was not required to advance a certified check until notification was received that the boiler was ready for shipment. This contention, contrary to the clear and unambiguous

language of the agreement, is predicated upon the claim that the parties in other transactions had established that payment was to be made upon notification that the boiler was complete and ready for shipment.

Plaintiff relies upon U.C.C. 1-205 as controlling. The answer to this contention is simply that the U.C.C. has no application to the facts of this case.

There is no reason to resort to custom or trade practice for interpretation when the contract is unambiguous. CABLE-WIEDEMER, INC. v. A. FRIEDERICH & SONS CO., 71 Misc. 2d 443, 336 NYS2d 139. Parties may contract expressly in accordance with custom, contrary to custom, or in absence of custom, and the express agreement governs and controls the transaction; the existence or absence of custom is immaterial. R.L. ROTHSTEIN CORP. v. KERR S.S. CO., 21 AD2d 463, 251 NYS2d 81.

The trial court refused to adopt the contention of plaintiff that the parties must forever be bound by their prior dealings and may not enter into clear and unambiguous terms which set forth a different contractual relationship.

It cannot be said that the trial court in refusing to allow U.C.C. 1-205 to control the interpretation of the Tuck agreement erred as a matter of law.

Plaintiff's own exhibits do not sustain its contention. The Tuck contract provides for a certified check in advance of shipment. (Plaintiff's Exhibit 2(a).) The Imperial contract calls for a 1% check in

advance (Plaintiff's Exhibit 11).

These two completely different and distinct methods of payment can hardly sustain the plaintiff's contention that a course of conduct was established regarding payment that is contrary to the clear language of the agreements.

POINT IV

DEFENDANT DID NOT OWE PLAINTIFF A DUTY TO ALLOCATE MATERIALS UNDER U.C.C. 2-615.

Plaintiff agrees that under U.C.C. 2-615 defendant would be excused from the Tuck contract on the basis of impossibility of performance.

Plaintiff argues, however, that "Lavern Brenneman, a witness for York-Shipley, testified that there was enough of the required materials at their disposal already to build the Tuck boiler and save the contract." (Plaintiff's brief, page 30.) Under these circumstances, urges plaintiff, defendant had a duty to allocate materials and thereby complete the Tuck boiler.

It is interesting to note that plaintiff fails to indicate on what page of the record this amazing admission is made by Lavern Brenneman. It is submitted that plaintiff's view of this witness's testimony is a figment of counsel's imagination.

At no time prior to November 5, 1974, the date on which the

steel for the Tuck boiler arrived in New York, did defendant have sufficient steel on hand to fabricate the Tuck boiler. The trial court, as the finder of fact, so concluded from the evidence.

It is difficult to comprehend on what basis plaintiff urges that the doctrine of allocation of materials where none existed applies to the facts of this case. In MANSFIELD PROPANE GAS CO. v. FOLGER GAS, 231 Ga. 868, 204 SE 2d 625, cited by plaintiff, the Supreme Court of Georgia stated where the contract provided that the seller would sell and deliver to buyer latter's propane gas...seller was permitted to allocate among its customers...under UCC 2-615 and parties to the contract were bound by the rule of allocations absent an affirmative provision in the contract that seller would perform the contract even though contingencies which permit allocation might occur. The key words are "absent an affirmative provision in the contract."

The Tuck contract under items 1 and 2 on the reverse side thereof clearly absolves defendant from any liability for its failure to deliver the boiler caused by the inability of vendors of the defendant to deliver materials to it.

The affirmative provisions of the Tuck contract clearly takes it out of the doctrine of allocation and excuses defendant from non-performance.

POINT V

THE TRIAL COURT DID NOT ERR IN FAILING TO AWARD DAMAGES FOR GOOD WILL TO PLAINTIFF UNDER THE IMPERIAL CONTRACT.

Plaintiff argues that the Court below erred in not awarding damages for good will to plaintiff under the Tuck contract in the first cause of action and under the Imperial contract in the second cause of action.

It is obvious that the Court in the Tuck contract never reached the issue of damages sustained by plaintiff as it held that defendant was not in default under the Tuck contract by reason of the shortage of steel which excused defendant from performing under the terms of that contract. The Trial Court ruled only on the question of liability as to the Tuck contract, and hence, this Court may not consider the issue of damages pertaining to that contract.

In regard to the Imperial contract, the Court awarded damages to plaintiff in the sum of $4,195.00.

The second cause of action seeks damages in the sum of $25,000.00, representing lost profits, loss of business customers, and loss of good will.

At the very outset, it is to be noted that plaintiff does not appeal from that portion of the judgment which awarded it the sum of $4,195.00, representing lost profits in connection with the Imperial

contract. The sole ground of appeal as to the Imperial contract relates only to the claim that the Court below should have included damages for loss of good will.

The contract entered into between plaintiff and Imperial was with one particular customer for one particular item. Imperial filed a Chapter 11 proceeding in bankruptcy on March 11, 1975. There is no proof in the record that the failure of defendant to comply with the Imperial contract in any way contributed to or was the cause of Imperial filing the Chapter 11 proceeding.

It is fundamental that the burden of proof to demonstrate loss of good will as an element of damages rests with the plaintiff.

The record below is completely barren of any evidence sufficient to serve as a basis to entertain the question of loss of good will as claimed by plaintiff. In brief, there was no evidence of loss of good will.

Whatever good will plaintiff deems to have lost to its business reputation with this particular contract (Imperial) must be demonstrated by some quantum of evidence to sustain this claim. It cannot be said that Imperial, which is in Chapter 11, will continue to do business at all or that its failure to do so with plaintiff is attributable to the failure of plaintiff to deliver the boiler under the Imperial contract.

Plaintiff recognizes that its claim of loss of good will is simple and pure speculation without any basis in fact. On page 38 of plaintiff's brief, plaintiff states "It is not beyond belief, indeed it is in

all probability, that he has lost their future business considerations as a result of York-Shipley's breach." It is submitted that "belief" and "probability" as a guess by plaintiff does not sustain the burden of proof required of plaintiff to sustain as an item of damage the loss of good will.

It needs no citation of authority to state that damages may not be awarded on belief, conjecture or speculation.

The trial court did not err in refusing to award plaintiff as an item of damage the loss of good will on the Imperial contract as claimed by plaintiff.

CONCLUSION

The judgment of the District Court should be in all respects affirmed.

Respectfully submitted,

GOLDMAN, HOROWITZ & CHERNO
Attorneys for Defendant-Respondent

STANLEY THALER
Of Counsel

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

JULIO VALLEJO JR., being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 2742 PITKIN AVE BROOKLYN, N.Y.

That on the 13 day of DECEMBER, 1976, deponent personally served the within BRIEF FOR DEFENDANT-RESPONDENT upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

~~By leaving _____ true copies of same with a duly authorized person at their designated office.~~

By depositing 2 true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United Stated post office department within the State of New York.

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

WILLIAM K. MADDEN, ESQ.
ATTORNEY FOR PLAINTIFF-APPELLANT
953 FRANKLIN AVE.
GARDEN CITY, N.Y. 11530

Julio Vallejo Jr.

Sworn to before me this
13th day of December, 1976

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1978